(2)

Supreme Court, U.S.
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No. 00-1768

In the
Supreme Court of the United States

Susan Ludwig,

Petitioner,

v.

Northwest Airlines, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR NORTHWEST AIRLINES, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly affirmed the district court's conclusion that the petitioner failed to rebut respondent's showing of non-discriminatory intent, lack of pretext and business purpose to its decision to reject petitioner's application to become an airline pilot, thereby compelling summary judgment under *McDonnell Douglas*.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Northwest Airlines, Inc. makes the following disclosure:

1. Northwest Airlines, Inc. is an indirect, wholly owned subsidiary of Northwest Airlines Corporation, a Delaware corporation. Northwest Airlines Corporation is publicly held.

2. Based on a Schedule 13G filed with the Securities and Exchange Commission, AXA Financial Inc., a wholly-owned subsidiary of AXA, a publicly-held French holding company, is the only publicly-held company that owns ten percent or more of Northwest Airlines Corporation stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENT 5

I. Ludwig waived her first question by failing to argue it below 5

II. The Court of Appeals considered and rejected Ludwig's *Reeves v. Sanderson Plumbing Products, Inc.* argument. 10

III. The district court properly held that Ludwig failed to show pretext. 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 9

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 7, 12

Barfield v. Orange County, 911 F.2d 644 (11th Cir.1990) 8

Becker v. ABB Power T&D Co., Inc., ___ F.3d ___, No. 00-2519, 2001 WL 388854 (8th Cir. 2001) 15

Blizard v. Fielding, 572 F.2d 13 (1st Cir. 1978) 9, 15

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 6

Cervantes v. Wal-Mart Stores, Inc, 242 F.3d 387, No. 00-1058, 2001 WL 8305 (10th Cir. 2001) 8

Chandler v. Roudebush, 425 U.S. 840 (1976) 10

Coleman v. Quaker Oats Co., 232 F.3d 1271 (9th Cir. 2000) *cert. denied sub. nom. Gentile v. Quaker Oats Co.*, (July 2, 2001) 7

Coupé v. Federal Express Corp., 121 F.3d 1022 (6th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998) 19

Delta Air Lines v. August, 450 U.S. 346 (1981) 6

Dionne v. Thompson, 00-468, *cert. denied* Feb. 20, 2001, 69 USLW 3552 16

EEOC v. American Airlines, Inc., 48 F.3d 164 (5th Cir. 1995) 18

EEOC v. Insurance Co. of N. Am., 49 F.3d 1418 (9th Cir. 1995) 7

EEOC v. Missouri State Highway Patrol, 748 F.2d 447 (8th Cir. 1984) 19

Gifford v. Atchison, Topeka and Santa Fe R. Co., 685 F.2d 1149 (9th Cir. 1982) 7

Gillin v. Federal Paper Bd. Co., Inc., 479 F.2d 97 (2d Cir. 1973) 7

Goldberg v. State Comm'n for Human Rights, 54 Misc. 2d 676, 283 N.Y.S. 2d 347 (1966) 9

Hall v. Western Prod. Co., 988 F.2d 1050 (10th Cir. 1993) 8

Heyne v. Caruso, 69 F.3d 1475 (9th Cir. 1995) 8

Johnson v. American Airlines, Inc., 745 F.2d 988 (5th Cir. 1984) 19

Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304 (8th Cir.), *cert. denied*, 469 U.S. 1041 (1984) 7, 9

Kremer v. Chemical Constr. Co., 456 U.S. 461 (1982) 9

Lawrence v. University of Missouri, 00-171, *cert. denied* Oct. 10, 2000, 69 USLW 3257 16

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 11

McClure v. Mexia Indep. Sch. Dist., 750 F.2d 396 (5th Cir. 1985) 8

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 4, 16, 19

Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) 18

Nunez v. Superior Oil Co., 572 F.2d 1119 (5th Cir. 1978) ... 17

Paolitto v. John Brown E. & C., Inc., 151 F.3d 60, 65 (2d Cir. 1998) 8

Plummer v. Western Int'l Hotels Co., Inc., 656 F.2d 502 (9th Cir. 1981) 7

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 6, 10, 11, 12, 15, 16, 20

Rizzo v. Children's World Learning Ctrs, 213 F.3d 209 (5th Cir.), *cert. denied*, ___ U.S. ___, 121 S. Ct. 382 (2000) 17

Robinson v. American Airlines, Inc., 908 F.2d 1020 (D.C. Cir. 1990) 19

Smith v. Universal Servs., Inc., 454 F.2d 154 (5th Cir. 1972) 8, 9

Tatom v. Georgia-Pac. Corp, 228 F.3d 926 (8th Cir. 2000) 15

Tulloss v. Near N. Montessori Sch., Inc., 776 F.2d 150 (7th Cir. 1985) 7, 8, 9

United Auto Workers v. Johnson Controls, Inc., 499 U.S. 187 (1992) 18, 19

University of Tennessee v. Elloitt, 478 U.S. 788 (1986) 9

Walker v. Nationsbank of Florida, N.A., 53 F.3d 1548 (11th Cir. 1995) 8, 17

Ward v. Heritage Media Corp., 00-583, *cert. denied* Jan. 8, 2001, 69 USLW 3456 16

Western Airlines v. Criswell, 472 U.S. 400 (1985) 18

Wilcox v. State Farm Mut. Auto. Ins. Co., ___ F.3d ___, ___, No. 00-2516, 2001 WL 649052 (8th Cir. June 11, 2001) 15

Williams v. Nashville Network, 132 F.3d 1123 (6th Cir. 1997) 8

STATUTES AND RULES

14 C.F.R. § 121.413(a)(4)(ii)(2001) 1, 18

28 U.S.C. § 1254(1) 1

49 U.S.C. § 44936 2

49 U.S.C. App. § 44702(b)(1)(A) 1, 18

Fed. R. Civ. P. 56 ..... 6, 20

Fed. R. Civ. P. 56(c) 10

Fed. R. Civ. P. 56(e) 10, 19

Fed. R. Evid. 403 9

Fed. R. Evid. 803(8)(C) 8

Sup. Ct. R. 10(a) 10

Sup. Ct. R. 10(c) 9, 10

OTHER AUTHORITIES

HOUSE COMM. ON TRANSPORTATION, ARILINE PILOT HIRING AND SAFETY ACT OF 1996, H. Rep. No. 104-684 (1996) 2

Respondent Northwest Airlines, Inc. asks this Court to deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The court of appeals decision (Pet. App. A-1 – A-2) is reported as a table decision at 242 F.3d 376 (8th Cir. 2001). The full, unpublished affirmance is available on Westlaw at No. 00-2258, 2001 WL 10908 (8th Cir. Jan. 5, 2001). The district court opinion (Pet. App. A-3 – A-30) is reported at 98 F. Supp. 2d 1057 (D. Minn. 2000).

JURISDICTION

The court of appeals entered judgment on January 5, 2001, and denied Ludwig's petition for rehearing *en banc* on February 22, 2001. Pet. A-31. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Nominally an employment case, Northwest Airlines' decision not to make Susan Ludwig a pilot intimately involved airline safety. Ludwig's non-selection was no accident and certainly not pretextual. Northwest Airlines is obliged by law to conduct flight operations with "the highest possible degree of care." 49 U.S.C. App. § 1421(b). The Federal Aviation Administration (FAA) applies this statutory directive specifically to pilot hiring. By FAA rule, airlines are required to consider all "personal characteristics that could adversely affect safety in pilot decisions." 14 C.F.R. § 121.413(a)(4)(ii) (2001).

Congress recently strengthened the airlines' ability to assess applicants by enacting the Pilot Records Improvement

Act of 1996, P.L. 104-264, Title V, 110 Stat. 3213, 3259-63, *amending* 49 U.S.C. § 44936. This legislation responded to a fatal air crash that was attributed to ineffective screening of new hires; then-existing law blocked a prospective employer's access to a candidate's prior work history. *See* HOUSE COMM. ON TRANSPORATION, AIRLINE PILOT HIRING AND SAFETY ACT OF 1996, H. Rep. No. 104-684, at 4-5 (1996). The new statute mandated the disclosure of a pilot's work history to prospective employers. Against this statutory and regulatory backdrop, Northwest Airlines conducted the selection process that this petition now seeks to attack.

In 1994, after a four-year hiring hiatus, Northwest Airlines launched a new pilot recruiting and selection program. Hoping to add approximately 400 pilots, the airline looked first to internal candidates. Ludwig washed out of the 1994 class. She was excluded after "decisively fail[ing] the simulator test."[1] Pet. A-6. All incumbent employees who survived the screening process were hired.

In 1995, Northwest Airlines' hiring needs again exceeded the available pool of internal applicants. As a result, every internal applicant who successfully demonstrated their qualifications received an offer. Consistent with its overarching safety obligations, Northwest Airlines rigorously reviewed all applicants. Undeterred by her previous missteps, Ludwig tried again to secure a pilot's job.

The 1995 internal selection process began by eliminating all applicants who lacked minimum qualifications, such as continuity of service, certificates, ratings and flight experience. A500. Ludwig failed the continuity of service

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[1] Ludwig performed erratically in her simulator test, staying behind the aircraft and compounding her erratic handling through over-control. Besides extremely poor flying performance, she failed to use crew members as necessary or call for an approach briefing. A709-11. Because she failed the first phase of the application process in 1995, Ludwig did not take a flight simulator test as part of her 1995 application.

qualification, but Northwest Airlines waived that provision for her. Pet. A-6 n.4, A426. Candidates who passed this minimal screening proceeded to a multiple choice test – the Multidimensional Aptitude Battery – and an employment history check. A501-02. Another paper and pencil assessment known as the Personal Characteristics Inventory (PCI) was also administered, but ultimately not used. A501.

This selection process was designed to find applicants who had demonstrated good crew resource management (CRM) skills.[2] A395 A502. As part of its search for qualified internal applicants, Northwest Airlines scrutinized applicants' backgrounds. The background check consisted of inquiries to the FAA, the National Driver Records Database and other sources. A390. Additionally, Northwest Airlines pulled each applicant's personnel file and questioned each applicant's supervisors. A421, A502. Northwest Airlines also evaluated attendance. A502. Absenteeism is a serious industry concern; if pilots do not report for work, flights are canceled. An airline's reliability and on-time performance record are critical to customer satisfaction and economic success.

Ludwig makes much of the company's decision to substitute a detailed background check for a multiple choice inventory of personality traits. But the undisputed record establishes that the decision was made without regard to the PCI test results and undertaken for a sound business reason – "[P]ast behavior is a very good predictor of future behavior." Pet. App. A-17. Simply put, an airline that selected a pilot without looking at available work history information would

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[2] CRM skills cover a range of cockpit-related performance. These skills are important to safe airline operations – the FAA and the National Transportation Safety Board have attributed a significant percentage of aviation accidents to failures in CRM skills. Pet. App. A-5 n.3. It was undisputed that CRM skills are critical to safe piloting and include, for example, the ability of a pilot to lead effectively and to work as a team in the cockpit and with air control. A606-08.

be ignoring critical information. Scrutiny of personnel records is exactly what Congress provided for when enacting the Pilot Records Improvement Act.

Ludwig's background check undisputedly revealed significant attendance and performance problems. Ludwig's track record was punctuated by excessive sick calls and frequent leaves of absence. A502-03, A518. Moreover, her file was littered with incidents that exhibited poor CRM skills: ineffective communication, a lack of cooperation and teamwork and failure to use other crew members. A502-03, A518, A601-02, A709-11.

Based upon her employment record, Northwest determined that "[Ludwig's] attendance, work ethic, and behavioral problems with internal and external customers, [were] a problem . . . she would not make a reliable, safe crew member in the cockpit flying Northwest Airline[s] aircraft." A430-31. Significantly, Ludwig does not dispute that the incidents in question occurred or that her files and supervisors revealed the behaviors that lead to her non-selection. Given its statutory mandate to operate with the "highest possible degree" of care, Northwest Airlines declined to put Ludwig into the cockpit.

After failing to make the cut a second time, Ludwig filed charges with the EEOC and subsequently sued in federal district court. Her complaint alleged disparate impact and retaliation claims in violation of Title VII.[3] Pet. A-8. In a carefully reasoned opinion, Chief Judge Magnuson entered summary judgment. Ludwig's Title VII (disparate treatment) claim, was analyzed pursuant to the three-step test established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Pet. A-9 – A-15. Ludwig met the minimal objective criteria, Pet. A-11, but the legitimate nondiscriminatory reasons for Northwest's action were unrebutted. Pet. A-12. In addition,

[3] The retaliation claim is not part of Ludwig's petition.

the district court found that Ludwig's pretext evidence did not pass muster under *McDonnell Douglas*. Pet. A-12 – A-15.

The district court similarly dissected Ludwig's disparate impact claim. Again, Ludwig's evidentiary showing was held wanting. Pet. A-15 – A-19. For Ludwig's benefit the court assumed a prima facie case. Pet. A-16. But Northwest Airlines' reliance on job performance history was justified by business necessity. Pet. A-16 – A-17. Without evidence to the contrary, the Title VII disparate impact claim also failed.

The court of appeals readily affirmed for the reasons stated in the district court's "thorough opinion." Pet. App. A-2.

ARGUMENT

I. Ludwig waived her first question by failing to argue it below.

In the first question presented to this Court, Ludwig asserts that an EEOC probable cause determination should preclude summary judgment. Moreover, she contends that the court of appeals disregarded the administrative finding in affirming summary judgment. To buttress this argument, Ludwig infers a circuit split regarding the evidentiary significance of an EEOC determination. Because the Eighth Circuit failed to discuss the EEOC's determination of probable cause, Ludwig suggests that the agency's action was accorded no probative value. This first question deserves no consideration here because the issue was neither presented to nor addressed by the lower courts.

Both decisions below are silent regarding the deference paid to the EEOC's determination. This silence is unsurprising; Ludwig only obliquely mentioned the administrative treatment of her charge below. Before the district court, Ludwig referenced the determination in her factual statement, but never argued its significance.

Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 1,15, 16-22. Before the court of appeals, Ludwig briefly noted the EEOC finding in her summary of the case and factual statement, *see* Appellant's Brief and Addendum at i and 26-27, but in her issues presented and her legal argument, Ludwig was silent on the subject, *see id.* at vi-vii, 33-53. Ludwig's reply brief suggests that the EEOC determination somehow indicated disparate treatment, but that assertion was simply one of 11 examples of alleged discrimination. *See* Appellant's Reply Brief and Addendum at 23-27.

Ludwig never argued, as she suggests now, that the probative value of an administrative agency finding trumps a federal court's authority to grant summary judgment. Consequently, the first question cannot be raised in this certiorari petition. *See, e.g., Delta Air Lines v. August*, 450 U.S. 346, 362 (1981) ("that question was not raised in the court of appeals and is not properly before us").

Nor is there merit to Ludwig's first issue. *Reeves* did not propound a new standard judgment standard. Rather, that case simply clarified what a trial rule should review when addressing a Rule 50 motion for judgment as a matter of law. *See Reeves*, 530 U.S. at 149-50. The Court noted that the summary judgment process involves the same standard applied to the record as a whole. *Id.* at 150.

As set out in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and its companion cases, summary judgment is an integral part of the Federal Rules as a whole, which are designed to secure "'the just, speedy, and inexpensive determination of every action.'" *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1). Summary judgment involves a multi-step process, with the moving party bearing the burden of showing there are no genuine issues of material fact and that it is entitled to judgment in its favor as a matter of law. *Id.* at 323. The party opposing summary judgment cannot rest on allegations or simple denials, but must put forward

specific, affirmative and admissible facts that show there is a genuine issue of disputed fact for trial. *Id.* at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S, 242, 256-57 (1986). Ludwig failed in this essential step – her response was simply her argument and unsupported assertions. *See* Pet. A-12 – 13.

Ludwig does not show any apposite authority to support her first question. Indeed, she cites no authority of this Court or any other court for the proposition that an EEOC probable cause determination automatically creates a disputed fact issue. Rather, the contrary is the case. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1283-84 (9th Cir. 2000). No. 00-1560, *cert. denied sub. nom. Gentile v. Quaker Oats Co.*, (July 2, 2001). EEOC reports are hardly uniform and vary widely in quality and detail. S*ee Johnson v. Yellow Freight Sys., Inc.*, 734 F.2d 1304, 1309 (8th Cir.), *cert. denied*, 469 U.S. 1041 (1984). Like the finding in this case, such determinations frequently rest on conclusory statements. Too often the underlying facts and the weight afforded to the evidence presented are not revealed by the administrative record. *Coleman*, 232 F.3d at 1284;[4] *see also Gillin v. Federal Paper Bd. Co., Inc.*, 479 F.2d 97, 99 (2d Cir. 1973) (EEOC investigatory file was a "'mish-mash of self-serving and hearsay statements and records'") (quoting district court). Because the federal courts remain the ultimate, independent arbiters of Title VII claims, *Tulloss v. Near N. Montessori*

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[4] Ludwig suggests that *Gifford v. Atchison, Topeka and Santa Fe R. Co.*, 685 F.2d 1149 (9th Cir. 1982), and *Plummer v. Western Int'l Hotels Co., Inc.*, 656 F.2d 502 (9th Cir. 1981) are contrary to *Coleman*. But those cases were decided well before *Coleman*. Moreover, *Gifford* and *Plummer* are easily reconciled with *Coleman*: under Ninth Circuit precedent, EEOC determinations are *per se* admissible, but consistent with the rule that Title VII cases are tried *de novo* in the federal courts, *see* text, *infra* at 9-10, the evidentiary weight of an EEOC report is left to the district court in the first instance. Thus, even if an EEOC determination may be probative, as recognized in *Gifford* and *Plummer*, the *Coleman* decision holds a Title VII claim is still subject to summary judgment.

Sch., Inc., 776 F.2d 150, 154 (7th Cir. 1985), even summary judgment against the EEOC may be granted. *See, e.g., EEOC v. Insurance Co. of N. Am.*, 49 F.3d 1418 (9th Cir. 1995).

Having failed to support the bald proposition embraced by her first question, Ludwig changes tack to argue an apparent circuit conflict regarding the probative value of an EEOC determination. The cited authorities, however, do not reflect any meaningful circuit conflict. All agree that an EEOC report may, in the appropriate circumstance, be afforded probative value. The only difference among the various cases is two admissibility standards: a *per se* rule, such as articulated in *Heyne v. Caruso*, 69 F.3d 1475, 1483 (9th Cir. 1995) and *Smith v. Universal Servs., Inc.*, 454 F.2d 154, 157-58 (5th Cir. 1972);[5] and a rule that leaves the question of admissibility to the sound discretion of the trial court, as adopted in *Paolitto v. John Brown E. & C., Inc.*, 151 F.3d 60, 65 (2d Cir. 1998), *Hall v. Western Prod. Co.*, 988 F.2d 1050, 1057-58 (10th Cir. 1993) and *Barfield v. Orange County*, 911 F.2d 644, 650 (11th Cir.1990).[6] If there is a circuit conflict on admissibility, the difference as the Seventh

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[5] *But cf. McClure v. Mexia Indep. Sch. Dist.*, 750 F.2d 396, 400 (5th Cir. 1985)(an EEOC report may be excluded under Fed. R. Evid. 803(8)(C) if there are indications of untrustworthiness).

[6] Ludwig also cites *Williams v. Nashville Network*, 132 F.3d 1123 (6th Cir. 1997) and *Walker v. Nationsbank of Florida, N.A.*, 53 F.3d 1548 (11th Cir. 1995), as nominally supportive. But in each case the courts followed the majority view. Each decision also affirmed the exclusion of an EEOC report. *See Williams*, 132 F.3d at 1129; *Walker*, 53 F.3d at 1554-55.

Ludwig also cites an unpublished decision from the Tenth Circuit, *Cervantes v. Wal-Mart Stores, Inc*, 242 F.3d 387 (10th Cir. 2001) (Table), No. 00-1058, 2001 WL 8305 (10th Cir., Jan. 3, 2001). There, the appellate court reversed summary judgment in favor of the employer, because sufficient evidence had been proffered to infer pretext. *Id.* at *4. The Tenth Circuit did not base its reversal on the EEOC's probable cause finding.

Circuit recognized, is largely "academic" and without practical significance. *Tulloss,* 776 F.2d at 153.

Following the majority view, the Eighth Circuit leaves the question of admissibility to the trial court. *Johnson,* 734 F.2d at 1309. *Johnson* obviously indicates that the Eighth Circuit considers EEOC determinations as potentially probative, but the trial court must initially address admissibility under Fed. R. Evid. 403. Whether the district court below should have explicitly addressed Ludwig's EEOC report simply is not a question of national significance. *See* Sup. Ct. R. 10(c); *cf. Blizard v. Fielding*, 572 F.2d 13, 16 (1st Cir. 1978) ("Mere failure of the court in this instance to make reference to the EEOC findings is not sufficient to sustain an allegation of prejudicial error.").

Ludwig's suggestion that EEOC determinations should be given *res judicata* effect mischaracterizes the nature of those determinations.[7] An EEOC determination bears none of the hallmarks of adjudicative decision-making. Instead EEOC findings are based upon written submissions and ex parte interviews. Neither the complainant nor the employer can cross-examine witnesses. *See Tulloss, 776* F.2d at 154, *Smith*, 454 F.2d at 160-61 (Dyer, J.) (dissenting from denial of petition for rehearing en banc). And contrary to what Ludwig suggests by her *University of Tennessee v. Elloitt*, 478 U.S. 788 (1986) citation, Congress specified the federal courts as the final authority to decide Title VII claims. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 and 60 n. 21 (1974). Thus, Title VII claims are tried *de novo* in federal courts – neither the employee nor the employer is bound by

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[7] Ludwig's citation on this point to Justice Blackmun's dissent in *Kremer v. Chemical Constr. Co.*, 456 U.S. 461 (1982), is both misleading and inexplicable. Justice Blackman is misquoted – his reference to a probable cause standard was not to an EEOC determination – but merely to a state agency determination involving a housing discrimination charge under state law. *See id.* at 507 n.22 (quoting *Goldberg v. State Comm'n for Human Rights*, 54 Misc. 2d 676, 680, 283 N.Y.S. 2d 347, 352 (1966)).

the agency's determination. *See Chandler v. Roudebush*, 425 U.S. 840, 844-45 (1976). Carried to its logical extreme, Ludwig's argument would require summary judgment against every Title VII plaintiff who failed to secure a probable cause determination from the EEOC.

In short, there is no circuit conflict regarding whether an EEOC determination precludes summary judgment or any meaningful conflict about the probative value of EEOC determinations. In any event, since the issue was not raised below, this is not the case in which to address such a minor evidentiary issue.

II. The Court of Appeals considered and rejected Ludwig's *Reeves v. Sanderson Plumbing Products, Inc.* argument.

For her second question, Ludwig insists that review is warranted because *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) was not followed. This argument is premised on the timing of the district court's decision, which predated *Reeves*, and the court of appeals' affirmance, which is based upon the district court's "thorough opinion." Pet. A-2. Without citing Sup. Ct. R. 10(a) or 10(c), Ludwig seems to be invoking this Court's supervisory function, supposedly to correct a lower court's mistake. But this case presents nothing more than a fact-bound inquiry into whether well established summary judgment standards were correctly employed. Certiorari jurisdiction does not exist to correct errors below, but rather to address issues of recurring and national significance. Nothing in Ludwig's second question merits this Court's plenary review.

The decisions below faithfully applied Fed. R. Civ. P. 56(c) and (e) to the undisputed facts. While the district court's decision did not have the benefit of this Court's guidance in *Reeves*, there is no inconsistency between the two decisions. *Reeves* did not establish new rules for deciding

Title VII summary judgment motions. Instead, *Reeves* reiterated the existing standard that ". . . the court must review the record 'taken as a whole.'" 530 U.S. at 150 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).[8] There is nothing new about this directive. Ludwig acknowledged as much in her Eighth Circuit pleadings. *See* Appellant's Brief and Addendum at 31 and 33.

In his Rule 56 disposition of Ludwig's claims, Chief Judge Magnuson did not depart from the admonitions of *Reeves*. The district court did not weigh the facts to find Northwest's position more persuasive. Rather, the opinion concluded that Ludwig failed to proffer evidence, as opposed to unsupported, conclusory allegations, to rebut Northwest Airlines' showing. For example, the district court observed: "Ludwig has supplied the Court with voluminous documentation about the other applicants, most of which is either indecipherable or unsupportive of her position." Pet. A-13 (emphasis added). Similarly, the court assessed Ludwig's proffer as follows: "Again, neither of these statements are anything more than bald accusations, wholly conclusory and unsupported by the record." *Id.*; *see also* A-12 – A-13 ("This averment, however, is not supported by the record.").

Moreover, Ludwig misapprehends the message of *Reeves*. That case does not create a shield against summary judgment. On the contrary, this Court observed:

> Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude

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[8] The Court also observed that ". . . the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Reeves*, 530 U.S. at 150 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986))

> that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law . . . if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Reeves, 530 U.S. at 148. Continuing, the Court discussed the factors which also guide summary judgment analysis:

> Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.

Id. at 148-49.

The district court was presented with a complete lack of evidence about pretext and uncontroverted proof regarding the reasons for Ludwig's non-selection. Ludwig failed twice to rebut Northwest Airlines' non-discriminatory explanation for its action. Evidence of pretext, moreover, was literally lacking. Pilots with bad CRM skills may put lives at risk. Undaunted, Ludwig presses her case a third time to this Court, referencing several examples of what the district court did not explicitly address. But her argument is nothing more than a rehash of the record on which the district court granted summary judgment and the court of appeals affirmed.

In particular, Ludwig argues about certain facts that the district court supposedly ignored. According to Ludwig, the district court's silence on these points renders summary judgment improper. Ludwig's assertions are not organized coherently by claim, so they will be addressed seriatim.

Failing to address that the female pass rate for the PCI test was higher than males. (Pet. 9.)

Failure to address the male pass rate for the PCI.

Failing to discuss the decision to use a background check over the PCI test.

The district court discussed these contentions and rejected them as legally unavailing. *See* Pet. A-6 – A-7 and A-1 and n.5.

Failing to address that Ludwig took her leaves pursuant to company rules and was never disciplined for excessive leave.[9] (Pet. 9.)

The district court unquestionably addressed attendance. Pet. A-3 – A-4, A-13. In any case, Northwest Airlines waived the continuous service requirement for Ludwig; otherwise her excessive leave – whether permitted or not – would have disqualified her. Pet. A-6 n.4.

Failing to address that two males besides Ludwig failed the 1994 simulator test. (Pet. 10-11.)

This fact is immaterial. Ludwig sued over her disqualification from the 1995 class, not the 1994 class. Pet. A-7.

Failing to address Ludwig's license status and hours of flight experience. (Pet. 11.)

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[9] Ludwig claims her leave was to attend Harvard's night extension school. The exhibit Y she cites in support makes no reference to her grade point average or to her "masters" program or thesis.

These were the minimal qualification for pilot candidates that the district court must have considered in sustaining Ludwig's Title VII prima facie case.

> Failing to discuss that the PCI was designed to assume applicants had the necessary skills to fly safely. (Pet. 11.)

The district court did discuss the PCI. Pet. A-6. Likewise, the court addressed the reason why Northwest Airlines always intended to conduct background checks – a background check was much more reliable. Pet. A-7. Because Ludwig could not dispute this fact, Northwest Airlines could show both lack of pretext and business necessity, regardless of the PCI. Pet. A-13 – A-14.

> Failing to address that the PCI was used for external applicants. (Pet. 12.)

This fact is also immaterial – Ludwig was evaluated as part of the internal applicant pool, all of whom would be offered a pilot training opportunity if they passed the initial evaluation. In any event, Northwest Airlines was unable to secure detailed background information on external applicants. The congressionally mandated release of employment history information for pilot applicants did not occur until 1996. But for internal applicants, Northwest had ready access to important data that related to their pilot qualifications.

> Failing to discuss that five male applicants who passed the background check also had discipline or performance issues.[10] (Pet. 12.)

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[10] Indicative of the unsupported nature of her argument, Ludwig introduces a red herring – Norman Prouse, who was, as Ludwig noted,

Plainly, Ludwig's second question is nothing more than an attempted reevaluation of the record before the district court. Facts that Ludwig says were ignored were either addressed or are immaterial. The district court was, moreover, well within its discretion in choosing which particular pieces of evidence to comment upon. *Blizard*, 572 F.2d at 15-16.

Concluding, Ludwig asserts that "*Reeves* is of no effect if the lower courts ignore it." Pet. 12. The contention that *Reeves* was ignored is an affront to the Eighth Circuit, which has had no difficulty applying *Reeves*. *See, e.g., Wilcox v. State Farm Mut. Auto. Ins. Co.*, ___ F.3d ___, ___, No. 00-2516, 2001 WL 649052, at *2 (8th Cir. June 11, 2001); *Tatom v. Georgia-Pac. Corp*, 228 F.3d 926, 931-32 (8th Cir. 2000).[11]

In short, Ludwig's *Reeves* argument involves nothing more than whether she successfully rebutted the evidence that her application was rejected because she was unfit to perform a pilot's duties, which involve responsibility for the lives of the crew and passengers. Whether the courts below were correct in their assessments is not a decision worthy of certiorari. No circuit conflict on this point could possibly exist; indeed, while admittedly nonprecedential, during this

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convicted of flying while intoxicated. But Prouse rehabilitated himself and earned back his wings, as well as a presidential pardon. *Spes vincent thronum.* Prouse was not part of Ludwig's 1995 class, and hence, whatever happened to him was irrelevant to Ludwig's claim.

[11] Use of West Group's KeyCite program yields a total of 24 Eighth Circuit decisions citing *Reeves*. In one of these cases, an argument similar to what Ludwig asserts with the first question was addressed. The Eighth Circuit observed that, while "Eighth Circuit law [was] displaced by *Reeves*, the district court's decision is in keeping with the *Reeves* decision." *Becker v. ABB Power T&D Co., Inc.*, ___ F.3d ___ (8th Cir. 2001) (Table) No. 00-2519, 2001 WL 388854, at *1 (Apr. 18, 2001). Had Ludwig presented her first issue to the court of appeals, the same observation would have undoubtedly been made.

term the Court has repeatedly refused to review the Eighth Circuit's application of *Reeves*.[12]

III. The district court properly held that Ludwig failed to show pretext.

For her final question, Ludwig argues that the district court, and by implication, the court of appeals, gave undue deference to Northwest Airlines' safety rationale. According to Ludwig, her employment record should have played no part in the assessment of the qualifications to be a pilot. By giving credence to Northwest Airlines selection process, Ludwig contends that the district court usurped the jury's role of determining whether the use of a background check was pretextual. Ludwig cites no basis in this Court's rules for granting certiorari on this issue. In any case, the entire argument is misplaced; the district court properly applied the *McDonnell Douglas* standards. That analysis compelled summary judgment in Northwest's favor. More importantly, there is also no circuit conflict regarding an airline's obligations to consider safety when pilots are hired.

It is beyond peradventure that the district court conducted a proper analysis under the *McDonnell Douglas* framework. The district court accepted Ludwig's prima facie case of discrimination. Pet. A-11. Turning to the second step, the district court found that the airline had shown legitimate non-discriminatory reasons for Ludwig's non-selection – ". . . high absenteeism, low CRM skills, troublesome attitude, and poor performance." *Id.* A-12.

The district court then focused on the dispositive issue of pretext. In finding that Ludwig failed to show pretext, the

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[12] *Dionne v. Thompson*, 00-468 *cert. denied* Feb. 20, 2001, 69 USLW 3284 and 3552; *Ward v. Heritage Media Corp.*, 00-583, *cert. denied* Jan. 8, 2001, 69 USLW 3321 and 3456; *Lawrence v. University of Missouri*, 00-171, *cert. denied* Oct. 10, 2000, 69 USLW 3146 and 3257.

district court did not weigh evidence or make a factual determination. Instead, Ludwig's failure to offer evidence of pretext was noted. Ludwig's case was reduced simply to conclusory arguments that were unsupported by the record. *Id.* A-12 – A-13.

Ludwig continues in the same vein here, decreeing that a multiple choice personality test is better than a detailed scrutiny of her work history as a flight attendant. But the argument is simply Ludwig's opinion, unsupported by any competent evidence and thus, insufficient to rebut Northwest Airlines' showing that a background check more accurately predicted a potential pilot's cockpit performance. Given the utter lack of evidence to the contrary, the district court very correctly granted Northwest Airline's summary judgment motion. None of the authorities Ludwig cites with question three suggest otherwise, each involving simply a fact bound review of whether summary judgment was proper or the evidence supported the jury's verdict.[13]

There is, moreover, no doubt that air carriers are legally bound to consider indicators of pilot performance in deciding who should be staffing the cockpit. Few jobs in this country implicate the lives and well being of as many people as that of a pilot. Congress requires air carriers to operate with "the highest possible degree of care." 49 U.S.C. § 44702(b)(1)(A).

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[13] *Nunez v. Superior Oil Co.*, 572 F.2d 1119 (5th Cir. 1978), was an action to cancel mineral leases and principally involved a discussion of which issues in the case were equitable and which were legal. *Id.* at 1126-28. In *Walker v. Thompson*, 214 F.3d 615 (5th Cir. 2000), the court of appeals simply reversed a grant of summary judgment, because the appellate court was persuaded differently about whether the employees had created a "genuine issue of material fact" on their employer's affirmative defenses to their hostile work environment claim. *Id.* at 626. *Rizzo v. Children's World Learning Ctrs*, 213 F.3d 209 (5th Cir.), *cert. denied*, ___ U.S. ___, 121 S. Ct. 382 (2000), involved an appeal from a jury verdict in favor of the employee. The central issue was whether an unobjected to jury instruction constituted reversible, plain error, an issue hardly relevant to Ludwig's third question. *Id.* at 212-13.

The FAA has likewise mandated consideration of pilot candidates "personal characteristics that could adversely affect safety" when selecting pilots. 14 C.F.R. § 121.413(a)(4)(ii). This Court has also recognized that "the central mission of the airline's business [is] the safe transportation of its passengers." *United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 203 (1991) (citing *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 (1985)). And with the 1996 legislation, Congress mandated a background check into pilot applicants. 49 U.S.C. § 44936(f)(1) ("Before hiring an individual, an airline shall request and receive the following information:") In view of these obligations, Northwest Airlines very properly availed itself of all available sources of information, including a background check to assess Ludwig's qualifications. Indeed, failing to take advantage of highly predictive performances data that were readily at hand would arguably have been negligent, if not foolhardy.

Extraordinary safety considerations have regularly been applied in airline employment cases. The case relied on by the district court, *Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982), held that an air carrier's overriding safety obligations made a pilot age limit a bona fide occupational qualification (BFOQ). *Id.* at 101. The Fifth Circuit also rejected an EEOC challenge to the same carrier's revised age-based pilot hiring policy, again on a safety rationale. *EEOC v. American Airlines, Inc.*, 48 F.3d 164, 170-71 (5th Cir. 1995). In upholding the age-based guideline, the Fifth Circuit rejected the EEOC's argument that *Western Air Lines v. Criswell*, 472 U.S. 400 (1985), changed applicable law to proscribe reliance on safety considerations, noting that this Court had expressly approved

the possibility that safety considerations could sustain age as a BFOQ. *Id.* at 170.[14]

Other appellate courts have similarly cited air carriers' safety obligations in affirming age or medically related hiring standards. *Coupé v. Federal Express Corp.*, 121 F.3d 1022, 1025 (6th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998) ("Safety, in our view, goes 'to the core' of an aircraft pilot's performance.") (quoting *United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 203 (1991)); *Robinson v. American Airlines, Inc.*, 908 F.2d 1020, 1023-24 (D.C. Cir. 1990) (height/weight and blood pressure guidelines upheld); *Johnson v. American Airlines, Inc.*, 745 F.2d 988, 991-93 (5th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) (age 60 retirement for all flight officers upheld). *Cf. EEOC v. Missouri State Highway Patrol*, 748 F.2d 447, 456-57 (8th Cir. 1984) *cert. denied*, 474 U.S. 828 (1985) (upholding state mandatory age 60 retirement for performance and health reasons, and noting that Congress had mandated an age 55 retirement for federal law enforcement personnel).

The district court plainly and correctly applied the *McDonnell Douglas* analysis. The burden of establishing that its pilot hiring criteria were not mere pretext was imposed on Northwest Airlines. The airline carried its burden, and Ludwig failed to respond with probative evidence to the contrary. The district court's reference to Northwest Airlines' safety mandate – which the lower courts have uniformly recognized – merely buttressed the decision. The assessment of pretext would have been regardless of the airline safety discussion. Nothing in the district court's application of *McDonnell Douglas* usurped the jury's role – Northwest Airline's showing was unrebutted, while Ludwig merely

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[14] Indeed, the *Murnane* decision was cited with approval in *Criswell*, with the proviso that the burden of establishing an age-related BFOQ rested with the employer. *Criswell*, 472 U.S. at 419 & n.29.

failed the burden Fed. R. Civ. P. 56(e) imposes. Thus, Ludwig's third question simply falls away.

CONCLUSION

The court of appeals correctly applied Rule 56 summary judgment standards. Ludwig disagrees with the result, but cannot coherently explain how the court of appeals' affirmance was flawed or inconsistent with this Court's decision in *Reeves*. Because Ludwig raises no issue worthy of certiorari review, her petition should be denied.

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